

No. 12862

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

---

HARWOOD A. WHITE,

*Appellant,*

*vs.*

SUSAN C. KIMMELL and E. P. DUTTON AND COMPANY,  
INC., a corporation,

*Appellees.*

---

## APPELLANT'S OPENING BRIEF.

---

SCHAUER, RYON & McMAHON,  
ROBERT W. McINTYRE,  
THOMAS M. MULLEN,

26 East Carrillo Street,  
Post Office Box 210  
Santa Barbara, California,

*Attorneys for Appellant.*



# TOPICAL INDEX

## PAGE

### I.

Statement of jurisdiction.....	1
A. Pleadings .....	1
B. Statutory provisions for the jurisdictions of the District Court and the United States Court of Appeals.....	2

### II.

Statement of the case.....	3
A. Questions involved in this appeal and the manner in which they arise.....	3
B. Facts .....	4

### III.

Specification of errors.....	10
------------------------------	----

### IV.

Argument .....	11
A. Acts of the author.....	11
B. Acts of other parties.....	13
C. Particulars in which the findings are unsupported.....	16
1. Findings on the number of copies made and distributed .....	16
2. Findings that publication by Mrs. Oettinger was limited and restricted.....	16
3. The findings are not only contrary to the evidence but are so technically inadequate that they do not constitute findings of fact on the issues raised.....	18

D. The law .....	21
1. Publication without claim of copyright constitutes a dedication to the public and a waiver of the right to claim a copyright .....	21
2. The intent of the writer is a factor in determining whether or not there has been a general publication but is not controlling.....	21
3. Circulation of literary property constitutes publication	21
4. Whenever an unrestricted portion of the general public has access to a work without further action on the part of the author, a publication occurs.....	22
5. Unrestricted sale of a single copy constitutes a publication .....	22
6. The testimony of a credible witness, which is unimpeached, may not be ignored.....	22
7. The publication shown by the record was neither limited nor private, but to the contrary, was general	22
8. There is no authority which sanctions the extent of publication shown by the evidence here as a private or restricted or limited publication.....	25

## TABLE OF AUTHORITIES CITED

CASES	PAGE
Basevi v. Edward O'Tool Co., 26 Fed. Supp. 41.....	21
Bobbs Merrill Co. v. Straus, 147 Fed. 15, 210 U. S. 339, 52 L. Ed. 1086.....	22
D'Ole v. Kansas City Star, 94 Fed. 840.....	21
Kurfiss v. Cowherd, 121 S. W. 2d 282.....	22
Twentieth Century-Fox v. Deickhaus, 153 F. 2d 893.....	22
Universal Film Mfg. Co. v. Coperman, 212 Fed. 301; 218 Fed. 577; 235 U. S. 704; 59 L. Ed. 433.....	21
Van Veen v. Franklin Knitting Mills, 260 N. Y. Supp. 163.....	22
Waring v. WDAS Broadcasting Station, 194 Atl. 631, 327 Pac. 433 .....	21
Werkmeister v. American Litho. Co., 134 Fed. 321.....	21

### STATUTES

United States Code, Title 17, Sec. 9.....	21
United States Code, Title 17, Sec. 10.....	21
United States Code, Title 17, Sec. 11.....	21
United States Code, Title 17, Sec. 34.....	2
United States Code, Title 28, Sec. 1338.....	2
United States Code, Title 28, Sec. 2201.....	2
United States Code, Title 28, Sec. 2202.....	2

### TEXTBOOKS

18 Corpus Juris Secundum, pp. 150, 198.....	21
---	----



No. 12862

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

---

HARWOOD A. WHITE,

*Appellant,*

*vs.*

SUSAN C. KIMMELL and E. P. DUTTON AND COMPANY,  
INC., a corporation,

*Appellees.*

---

## APPELLANT'S OPENING BRIEF.

---

### I.

#### Statement of Jurisdiction.

##### A. Pleadings.

1. This action was commenced upon the filing of an action for declaratory relief by appellant. The property involved is a manuscript caused to be compiled or compiled by Stewart Edward White, now deceased, called the "Gaelic" or "Old Gaelic" manuscript.

2. The Complaint [Tr. pp. 3 to 9] alleges the compilation of the "Gaelic" manuscript by Stewart Edward White; alleges that it was given general publication without claim of copyright by the author and by two other persons with the author's consent; alleges that subsequent to the general publication the author transferred his property in

the manuscript to defendant Susan C. Kimmell together with a further manuscript called "The Job of Living" which quotes from the material in the "Gaelic" manuscript; alleges that "The Job of Living" was published by said defendant under a claim of copyright; alleges that a dispute had arisen between appellant and appellee in respect to appellant's right to use either the portion of the "Gaelic" manuscript printed in "The Job of Living" under copyright claim or the remainder thereof not so published. The prayer is for a determination of the rights of the parties in respect to the use of the entire "Gaelic" manuscript.

3. The Answer of Susan C. Kimmell, appellee herein, [Tr. pp. 10 to 15], admits the allegations of the Complaint for the most part but denies that there was a general publication of the "Gaelic" manuscript prior to assignment to her and her publication under claim of copyright of "The Job of Living." In this respect the Answer alleges that the publications mentioned in the Complaint were limited, or special publications to persons specially interested in the contents only.

**B. Statutory Provisions for the Jurisdictions of the District Court and the United States Court of Appeals.**

1. The basic statutory jurisdiction in the federal courts is provided by Title 17 of the United States Code relating to copyrights. Federal jurisdiction was formerly provided by Section 34 of Title 17 and is now provided by Section 1338, Title 28, United States Code.

2. The particular form of the proceedings taken here are provided for by Sections 2201 and 2202 of Title 28, United States Codes.



II.

Statement of the Case.

A. Questions Involved in This Appeal and the Manner in Which They Arise.

1. The pleadings, if they raise any issue, only raise the issue of whether or not the publications by the author and by others with his consent, specified in the Complaint, were sufficient to constitute a general publication without claim of copyright under Title 17 of United States Codes. We inject the qualification in respect to any issue being raised by the pleadings for the reason that we feel that the giving, selling and revealing of the document with only the limitation that the same be limited to persons particularly interested therein, is in itself, a general publication. However, the cause was tried on the theory that the issue was whether or not there had been a general publication and to that single issue all the evidence was addressed.

2. Upon trial and submission of the cause, the trial court, in effect, found there had been no general publication of the "Gaelic" manuscript by the author or with his consent. [Par. VII of Findings, pp. 43 and 44 of Tr.] The principal issue here is whether or not this finding is supported by the evidence.

3. There are subsidiary questions relating to specific detailed findings, these are:

a. The Court found that not more than seventy-five (75) copies of the "Gaelic" manuscript had been produced and distributed [Tr. p. 43]. This finding is not supported by the evidence.

b. The Court found that the author granted to Margaret Oettinger and Ivy Oneita Duce permission

to reproduce said manuscript, but with the limitation that the same not be distributed to the general public [Tr. p. 42]. There is no evidence to support such finding in respect to Margaret Oettinger.

c. The Court found that the distribution of copies of "Gaelic" by the author was not made without restriction as to use thereof [Tr. p. 43]. The evidence does not support this finding.

d. The Court found that it was not true that the author permitted Margaret Oettinger to reproduce said manuscript and sell the same to many persons [Tr. p. 44]. The evidence does not support this finding.

e. The Court found that it was not true that the author permitted Ivy Oneita Duce to reproduce "Gaelic" and sell the same to her friends and acquaintances [Tr. p. 44]. This finding is contrary to the evidence.

f. The Court repeatedly made purported findings of fact which are conclusions of law, by way of qualification on characterization of the effect of certain acts of reproduction and distribution of the "Gaelic" manuscript, which render said findings equivocal and insufficient [Pars. V and VII of Findings, pp. 42 and 43 of Tr.].

## **B. Facts.**

Stewart Edward White, over the period of from the early 1920's to the early 1930's, wrote and caused to be compiled and written a certain manuscript which he called the "Gaelic" or "Old Gaelic" manuscript [Complt., Par. V, p. 4 of Tr., Ans., Par. III, p. 10 of Tr.]. This manuscript was originally produced, a small portion at a time,

from about 1923 to 1933 and the portions so produced were multiplied in about a dozen copies by ditto process and distributed to a small but not rigidly fixed group which included plaintiff [Tr. pp. 61 to 63]. In the fall of 1933 mimeograph stencils were cut and the manuscript mimeographed at the instance of Stewart Edward White [Tr. pp. 61 and 63, 79 to 81]. There were sixty (60) or seventy (70) copies made [Tr. p. 81]. W. N. Maguire was Stewart Edward White's secretary from about 1920 to the date of the death of Stewart Edward White in 1946 [Tr. p. 79]. She made up the mimeographed copies of "Gaelic" and at the request of Stewart Edward White mailed out eighteen (18) or twenty (20) copies to a list of persons furnished her by Stewart Edward White together with a letter of transmittal containing approximately the following wording:

"I have finally made some extra copies of 'Gaelic' because so many of you wanted them, and herewith is your copy. I am glad to know of your interest, and I wish you to read it, to use it as you like, and pass it on to others, and for as long a time as you can. If you get through with it, you might return it to me, to hand to someone else. Otherwise, you are at liberty to keep it." [Tr. p. 85.]

Later, additional copies were mailed out by Maguire at the request of Stewart Edward White to additional persons with the same letter of transmittal [Tr. p. 84]. Stewart Edward White left four or five copies with Maguire which she gave to friends or clients who were interested

in the manuscript; Stewart Edward White was not acquainted with these persons [Tr. p. 86]. The balance of the copies Stewart Edward White took home to loan or distribute [Tr. p. 86]. Stewart Edward White at no time made any statement to Maguire or to anyone in her presence limiting the use to be made of "Gaelic" by persons receiving the same [Tr. pp. 85 and 86]. The distribution made was not to any group or association [Tr. p. 87]. After a little over a year Stewart Edward White had Maguire make a second run of forty (40) or fifty (50) copies which he took home and distributed [Tr. pp. 87 and 88]. The distribution by Stewart Edward White of "Gaelic" was made in part to friends and acquaintances and in part to strangers who wrote him and requested a copy. No limitation was expressed by Stewart Edward White to the donees as to the use which might be made of "Gaelic" [Tr. p. 89]. Out of the two runs Maguire mailed out between forty-five (45) and fifty-five (55) copies of "Gaelic" to all parts of the United States [Tr. pp. 89 and 90].

At the time of Stewart Edward White's death he had only two mimeographed copies of "Gaelic" left in his possession [Tr. p. 71]. After Stewart Edward White's wife's death Stewart Edward White devoted his entire time to philosophy and its dissemination [Tr. p. 69]. At first Stewart Edward White had what he called Distributing Stations for "Gaelic." That is, a small group of close friends to whom he sent the manuscript either in the ditto form or mimeographed. Also, he sent "Gaelic" to a

selected group with the understanding that they were to use it to show to other people who might be interested in the philosophy therein expressed [Tr. pp. 71 and 72]. Later Stewart Edward White abandoned the "station" idea and sent "Gaelic" out to a wide group of people all over the United States, some of whom he did not know, but who asked him for a copy with the understanding that they should read it and should show it to their friends who showed an interest in the philosophy [Tr. pp. 72 and 73]. Stewart Edward White never sold a copy of the manuscript to anyone [Tr. p. 74].

Late in 1940 or early in 1941 a Margaret Oettinger of Palo Alto, California, wrote to Stewart Edward White requesting a copy of "Gaelic." Stewart Edward White replied that he had no extra copies left. Mrs. Oettinger then wrote requesting permission to make mimeographed copies for herself. Mr. White replied that she was at liberty to do so [Tr. p. 93]. Mr. White did not place any limitations in his correspondence on the persons among whom Mrs. Oettinger might circulate the manuscript [Tr. pp. 93, 94 and 95]. Several months after permission was given by Stewart Edward White to Mrs. Oettinger to make stencils, she again wrote to Stewart Edward White asking permission to charge persons, to whom the manuscript was to be distributed, the cost of reproducing the same [Tr. p. 96]. Mr. White replied that she could do so and requested that she let him know the amount to be charged per volume [Tr. p. 96]. Mrs. Oettinger only saw Stewart Edward White twice. This occurred in the

spring of 1941 [Tr. p. 107]. The "Gaelic" manuscript was discussed by Mr. White and Mrs. Oettinger. Mr. White told Mrs. Oettinger that he had no objections to additional copies of "Gaelic" being made, no limitations were placed on the amount to be charged per copy by Mrs. Oettinger nor to whom the manuscript was to be sold. It was understood between Stewart Edward White and Mrs. Oettinger that she was to charge enough to cover the cost of materials. None of this money was remitted to Stewart Edward White [Tr. pp. 108 to 114]. Mrs. Oettinger told Stewart Edward White that she was only going to mimeograph and give the manuscript to friends and people who wanted copies. At the time, she got permission to reproduce and sell copies of "Gaelic" [Tr. p. 117]. However, as time went on she sold copies to strangers some of whom were referred to her by Stewart Edward White and were strangers to him also [Tr. p. 127]. Mrs. Oettinger ran off three mimeograph reproductions of "Gaelic" each run averaging about forty (40) copies and the total amounting to about one hundred and twenty copies [Tr. p. 131]. The first two runs were sold by her at \$2.00 per copy and the last run at \$1.50 per copy because the stencils had deteriorated and the copies were not very clear [Tr. pp. 131 and 132]. Orders came through Stewart Edward White, through Mrs. Kimmell (appellee herein) and from persons who had seen a copy and wanted one [Tr. p. 127]. Sometime in 1943 Stewart Edward White granted permission to one Ivy Oneita Duce to reproduce "Gaelic" and dispose of the copies to a few of her friends at cost, and, according to her testimony,



she was cautioned by Stewart Edward White to use extreme care to prevent the document from falling into the hands of any unscrupulous persons who might "steal" the material [Tr. p. 185]. Ivy Oneita Duce is the head of the SUFI Order in the United States and has pupils in New York and throughout the country. All mimeograph publications were made without claim of copyright [Pltf. Ex. "f" in Evidence]. During his lifetime Stewart Edward White wrote another manuscript which he called "The Job" or "The Job of Living" in which he quoted portions of "Gaelic." This manuscript he transferred to appellee together with the "Gaelic" manuscript and others [Deft. Ex. B] shortly before his death. Appellee published "The Job of Living" in book form after the death of Stewart Edward White under a claim of copyright in herself [Deft. Ex. G, Complt., Tr. p. 5, Ans. Tr. p. 11]. Stewart Edward White died in 1947 and a dispute arose between appellant and appellees in respect to appellant's right to use and publish parts of the "Gaelic" manuscript which had and parts which had not been published in "The Job of Living." The dispute resulted in this litigation.

III.

Specification of Errors.

1. The primary error committed by the trial court is the finding from the evidence that there had been no general publication of "Gaelic" by the author or with his permission prior to publication of "The Job of Living." The evidence does not support such a finding, but, to the contrary, shows conclusively that there had been a general publication.

2. The court erred in finding that not more than seventy-five (75) copies of "Gaelic" were produced and distributed. The evidence shows more than two hundred (200) copies distributed.

3. The court erred in finding that Stewart Edward White instructed Margaret Oettinger not to distribute "Gaelic" to the general public upon giving her permission to reproduce and sell the same. There is no evidence to support this finding.

4. The court erred in finding that distribution of "Gaelic" was not made by the author without limitations upon the distributees as to its use. The evidence is contrary.

5. The court erred in finding that the author did not give one Ivy Oneita Duce permission to reproduce "Gaelic" and sell it to her friends and acquaintances. The evidence shows that he did.

6. The court erred in making findings which are equivocal and insufficient to meet all of the issues in this cause. The findings are in many instances conclusions and not factual in their content.



IV.

Argument.

A. Acts of the Author.

There is no real question in respect to the author's own activities in publishing the "Gaelic" manuscript without claim of copyright.

The first distribution in the ditto copies from 1923 to 1933 probably did not constitute a general publication. However, there can be no real question but that Stewart Edward White intended to and did publish "Gaelic" freely and without reservation from 1933 to his death. The only possible motive the author could have had under the circumstances shown by the evidence in multiplying and distributing the "Gaelic" manuscript and consenting to its multiplication and distribution as he did, was its publication. Stewart Edward White was not the head of or even a member of any spiritualistic organization; he was not the head of or even a member of any philosophical group or organization; nor was he trying to promote or foster any particular ideas. No motive is discernable from the evidence on the part of Stewart Edward White in publishing and permitting the publication of the "Gaelic" manuscript other than a desire to have people read the document. The distribution of the manuscript was not made in connection with any business or profession or any other primary activity. As before stated, the sole motive behind the reproduction and wide distribution of the mimeographed books was publication.

Stewart Edward White's attitude is perhaps epitomized by the following quotation from his letter of May 18, 1945, to Margaret Oettinger [Pltf. Ex. 3, Tr. p. 92]:

"As to the Gaelic, Sue Kimmell is quite right in saying that you may go ahead at your discretion with more copies of it. And your friend, Barbara Delkin, got the wrong impression. I have no objection whatever to the distribution of copies of Gaelic, provided, of course, it is not in published form."

Also his intent and attitude is indicated by the contents of the letter of transmittal that went with copies of "Gaelic" mailed to numerous individuals [Tr. p. 85].

"I have finally made some extra copies of 'Gaelic' because so many of you wanted them, and herewith is your copy. I am glad to know of your interest, and I wish you to read it, to use it as you like, and pass it on to others, and for as long a time as you can. If you get through with it, you might return it to me, to hand to someone else. Otherwise, you are at liberty to keep it."

The paragraph first above quoted was written by Stewart Edward White with full knowledge of what Mrs. Oettinger was doing, it is an express authorization to Mrs. Oettinger to go ahead with *more* copies of "Gaelic" at her *discretion*. The only limitation is that it is not to be put out in published *form*. There is not the slightest suggestion of any limitations on the *persons* to whom the manuscript was to be sold or the *number* of copies to be made by Mrs. Oettinger. While there is a limitation as to form, it must be borne in mind that Stewart Edward White was entirely cognizant of the form used both by himself and Mrs. Oettinger, at the time the letter was

written, and by its terms ratified past publication in that form and authorized further publication in that form.

The record further indicates that at the time Stewart Edward White gave permission to Mrs. Oettinger to make the "first run" of "Gaelic" she was a stranger to him and merely wrote him asking permission [Tr. pp. 92-94]. Later she saw him twice and upon the first occasion only was "Gaelic" discussed and that discussion related to making further copies of "Gaelic" [Tr. pp. 107-111].

The record indicates that Stewart Edward White did not wish to publish "Gaelic" as a conventionally printed book. He gave various reasons for this: He felt that his wife's work in this field was more important and should have precedence [Tr. p. 66]; that it was not in proper form for a book [Tr. pp. 134 and 171]; that he had been instructed by the Invisibles not to print it because of the war [Tr. p. 182]; that the Invisibles had instructed him not to publish "Gaelic" [Tr. p. 206]. Stewart Edward White was, however, happy to have Mrs. Oettinger mimeograph "Gaelic" and sell it and pass it about [Tr. p. 141].

#### **B. Acts of Other Parties.**

Margaret Oettinger mimeographed about one hundred twenty (120) copies of "Gaelic" and sold them to various persons at \$2.00 and \$1.50 per copy [Tr. pp. 118-119]. This was done with the consent of the author and with his active assistance. Stewart Edward White himself referred people who wished a copy to Mrs. Oettinger, some of which customers were friends and some strangers [Tr. pp. 127-128]. This certainly constituted a general publication by any standard.

Ivy Oneita Duce, the now recognized head of the SUFI Order in America, with Stewart Edward White's consent, borrowed the Oettinger stencils and ran off a few copies of "Gaelic" which she sold at cost to a few friends. According to Mrs. Duce's testimony she was cautioned by Stewart Edward White to use extreme care not only in respect to whom she gave a copy but also in respect to whom she even allowed to see it [Tr. pp. 184-185]. This extreme caution on the part of Stewart Edward White also appears in the testimony of appellee and one Don E. Stevens. However, it is to be noted that all the testimony of Kimmell, Duce and Stevens relating to the great care that should be exercised by them not to do any act that would constitute a publication and the extreme caution that they should use to prevent the manuscript from falling into the hands of unscrupulous persons who might "steal" from it, relates only to their own activities. None of the testimony of these three witnesses has, nor does it purport to have, any bearing on the Oettinger publication nor on the publication by the author himself. Mrs. Duce herself was virtually a stranger to Stewart Edward White as was Mrs. Oettinger. If Stewart Edward White was so concerned about the possibilities of "stealing" from the manuscript or loss of exclusive rights to it his behaviour in permitting them to reproduce the manuscript at all was strange indeed. Also, his attitude expressed to Mrs. Kimmell, Mrs. Duce and Mr. Stevens, according to their testimony, contrasts violently and strangely with that in his letters to and conversations with everyone else. There are two possible explanations. Perhaps Stewart Edward White was dubious in respect to "Sufies" or it is colored by bias and a desire to prevent the Appellant's use of the material.

In respect to the latter possibility it is to be noted that near the end of Stewart Edward White's life he and his brother, Appellant, fell into something of a controversy over the interpretation to be placed upon "Gaelic" [Defts. Ex. C]. Appellee joined in this controversy on the side of Stewart Edward White and drew to herself, after the death of Stewart Edward White, the support of Mrs. Duce and Mr. Stevens in active opposition to Appellant's use of the material. The testimony of this little coterie very probably is strongly colored by the controversy mentioned [Tr. p. 166]. Again we point out that the testimony of Kimmell, Duce and Stevens has no bearing on the activities of Stewart Edward White and Mrs. Oettinger in publishing "Gaelic." Assuming that the trial court believed every word of the testimony of Kimmell, Duce and Stevens we still have the unrefuted publication of "Gaelic" by the author and Mrs. Oettinger.

We believe that the basis for the trial court's decision may be gleaned from the following quotations from the record:

"The Court: In fact, I have done it myself. I have copyrighted lectures, when I was on the Extension Division, when I talked all over the State of California. For instance, I copyrighted a lecture I used to give on the defenses on the law of libel, and afterwards I was able to incorporate it in my first book on libel, and then in my second book, which I published this year." [Tr. p. 55.]

"The Court: All of us have pet ideas and spread them among people that might be interested in the thoughts we express.

The Witness: It is something like that.

The Court: If that were not so, some of us would not devote \$1,000.00 worth of time to give a speech for which we do not even get paid.” [Tr. pp. 73 and 74, Testimony of Harwood White.]

C. Particulars in Which the Findings  
Are Unsupported.

1. FINDINGS ON THE NUMBER OF COPIES MADE AND  
DISTRIBUTED.

A startling discrepancy between the evidence and the findings is set forth at the end of paragraph V of Findings [Tr. p. 43]. Here the court finds that the combined efforts of Stewart Edward White, Margaret Oettinger and Ivy Oneita Duce resulted in not more than seventy-five (75) mimeographed copies of “Gaelic.” The record, as has been before pointed out, shows a minimum of at least two hundred copies and the probability that the number approached three hundred.

2. FINDINGS THAT PUBLICATION BY MRS. OETTINGER  
WAS LIMITED AND RESTRICTED.

Here the court found that the publication of “Gaelic” by Stewart Edward White, Mrs. Oettinger and Mrs. Duce was not to the general public but only to friends and persons particularly interested in the *teachings* of Stewart Edward White and in his philosophy. In the first place there is no evidence whatever that Stewart Edward White had any “Teachings” or in any way was promoting any particular idea in handing out copies of “Gaelic.” In the second place it must be remembered that the manuscript, “Gaelic,” does not purport to be nor did Stewart



Edward White represent it to be, the product of his mind. "Gaelic," the spirit of an individual who had departed this world and become an invisible non-material entity, communicated the ideas to a group of persons and these communications were written down by various individuals present and were saved and collected by Stewart Edward White. If any "teachings" were being advanced they were the "teachings" of "Gaelic," not Stewart Edward White. In the third place the record clearly shows that Stewart Edward White distributed copies to strangers, whose only qualification was that they asked for a copy, and permitted Mrs. Oettinger to do the same and collect \$2.00 a copy. Also, he transmitted copies to friends and requested that they circulate it among their friends and their friends' friends, etc. The only motive Stewart Edward White had in requesting the return of any copy was to start it in circulation again. The court ignores everything Stewart Edward White actually did, ignores that which he permitted Mrs. Oettinger to do and assisted her in doing, and adopts the testimony of Kimmell, Duce and Stevens which only purported to bear upon their relations with Stewart Edward White as applying to Stewart Edward White's own activities and those of Mrs. Oettinger. Actually the record shows that Stewart Edward White had been circulating "Gaelic" for nearly twenty years before he even knew of Kimmell, Stevens and Duce.

These witnesses had no knowledge and in fact professed no knowledge of Stewart Edward White's activities or Mrs. Oettinger's activities in connection with the reproduction, circulation and sale of the "Gaelic" manuscript.

3. THE FINDINGS ARE NOT ONLY CONTRARY TO THE EVIDENCE BUT ARE SO TECHNICALLY INADEQUATE THAT THEY DO NOT CONSTITUTE FINDINGS OF FACT ON THE ISSUES RAISED.

The state of the Findings of Fact obviously arises from an attempt on the part of the court to avoid the effect of evidence which cannot be disputed or was admitted to be true. For instance, defendant Susan C. Kimmell testified that Mrs. Oettinger reproduced "Gaelic" and sold copies at \$2.00 each [Tr. p. 175]. Nowhere in the record is there any attempt even to refute the Maguire testimony relative to Stewart Edward White's circulation of "Gaelic." The attempt in the Findings is to characterize the admitted facts by conclusions of law in such a way as to avoid the effect of the facts. This process commences in paragraph V of Findings [Tr. p. 42]. The words "teachings of Stewart Edward White" are inserted with no foundation therefor in the record. The Finding sets forth the reproduction and circulation of "Gaelic" by Stewart Edward White, Mrs. Oettinger and Mrs. Duce but attempts to qualify it by stating that distribution was only to persons particularly interested in the contents and the teachings of Stewart Edward White and was not to the general public. What is a "person particularly interested in the contents"? Nowhere do the Findings state what such a person is or what his qualifications might be. Outside of our educational institutions persons seldom read any literature if they are not interested in the contents. The Findings then set forth that the distribution was "not to the general public without discrimination as to persons." What discrimination was exercised as to persons? Friends and interested persons? Whose friends? What constituted one a friend? Apparently from the record anyone who



asked Stewart Edward White for a copy or expressed admiration for "Gaelic" was a friend. Who and what were Maguire's friends, Oettinger's friends, friends of friends of Stewart Edward White? What is meant by general public? Distribution to only a small part of the general public constitutes publication.

The evasive and equivocal nature of the Findings reaches its acme in paragraph VII [Tr. p. 43]. This paragraph constitutes no finding at all. It starts out with the recitation that the allegation that Stewart Edward White distributed copies to more than eighteen (18) persons without reservations as to use, etc., is not true—a finding that distribution was not made to more than eighteen (18) persons does not meet the issues. Distribution to one, two, three or four persons could and may have constituted general publication. The Finding then goes on to recite that the allegation in the complaint relative to circulation by Stewart Edward White does not constitute a general publication. It is hard to say just what the court means by this remarkable assertion. Of course, no one claims that paragraph IX(1) of the complaint was a general publication, the only alternative interpretation is that the allegations referred to, if taken as true, would not constitute a general publication. Such is not a finding but would be in the nature of a ruling on the sufficiency of the pleading referred to. Reference to paragraph IX(1) of the complaint [Tr. p. 6] will show that the allegation, if true, would constitute publication.

The court then finds as to the allegations in paragraph IX(2) of the complaint that such allegations relating to Stewart Edward White's permitting many persons to borrow the manuscript and to read and loan it is not true insofar as "many persons" implies the general public,

and that the allegations do not constitute a dedication to the general public. Again this is no finding of fact but is a comment on the pleading and its sufficiency.

The court finds, in relation to paragraph IX(3), that the allegation that Stewart Edward White permitted Mrs. Oettinger to reproduce and sell a large number of copies "is not true," of course, the court in paragraph V of the Findings, finds that Stewart Edward White did permit Mrs. Oettinger to reproduce and sell "Gaelic" and the evidence without dispute so shows. It may be that the court is merely negating sale of a "large number of copies." If so, the Finding is inadequate for the reason that sale to one person of one copy is publication. The court further finds that the allegation of sale to various persons of a large number of copies does not constitute publication. Of course, the fact of sales of copies would unquestionably constitute publication.

The court finds, in relation to paragraph IX(3), that the allegations that Mrs. Duce was permitted by Stewart Edward White to reproduce and sell some copies to her friends and acquaintances is not true. The court found in paragraph V that Mrs. Duce did reproduce and sell the manuscript to her friends and acquaintances and the evidence so shows. The court then goes on to find that the allegations do not constitute a dedication, etc. The allegations, if taken as true, do constitute publication and the court's comments on the allegations do not constitute any finding of fact. Probably the intent of the court in making the findings filed was to make findings that publication was had but was only made to friends and persons interested. Even giving the findings the benefit of such an assumption they fall far short of adequacy. Persons particularly interested in the subject matter without any

further qualification does not constitute any classification or limitation on publication whatever. The limitation to "friends," without specifying whose friends and without any indication as to what constituted anyone "a friend," is also totally inadequate.

#### D. The Law.

1. PUBLICATION WITHOUT CLAIM OF COPYRIGHT CONSTITUTES A DEDICATION TO THE PUBLIC AND A WAIVER OF THE RIGHT TO CLAIM A COPYRIGHT.

We believe there is no dispute whatever upon this point and we will not labor it.

U. S. C. Title 17, Sections 9, 10, 11;

*Universal Film Mfg. Co. v. Coperman*, 212 Fed. 301; 218 Fed. 577; 235 U. S. 704; 59 L. Ed. 433;

*Basevi v. Edward O'Tool Co.*, 26 Fed. Supp. 41; 18 C. J. S. 198;

18 C. J. S. 150.

2. THE INTENT OF THE WRITER IS A FACTOR IN DETERMINING WHETHER OR NOT THERE HAS BEEN A GENERAL PUBLICATION BUT IS NOT CONTROLLING.

*Waring v. WDAS Broadcasting Station*, 194 Atl. 631, 327 Pac. 433;

*Werkmeister v. American Litho. Co.*, 134 Fed. 321.

3. CIRCULATION OF LITERARY PROPERTY CONSTITUTES PUBLICATION.

*D'Ole v. Kansas City Star*, 94 Fed. 840.

4. WHENEVER AN UNRESTRICTED PORTION OF THE GENERAL PUBLIC HAS ACCESS TO A WORK WITHOUT FURTHER ACTION ON THE PART OF THE AUTHOR, A PUBLICATION OCCURS.

*Kurfiss v. Cowherd*, 121 S. W. 2d 282;

*Van Veen v. Franklin Knitting Mills*, 260 N. Y. Supp. 163.

5. UNRESTRICTED SALE OF A SINGLE COPY CONSTITUTES A PUBLICATION.

*Bobbs Merrill Co. v. Straus*, 147 Fed. 15, 210 U. S. 339, 52 L. Ed. 1086.

6. THE TESTIMONY OF A CREDIBLE WITNESS, WHICH IS UNIMPEACHED, MAY NOT BE IGNORED.

*Twentieth Century Fox v. Deickhaus*, 153 F. 2d 893.

7. THE PUBLICATION SHOWN BY THE RECORD WAS NEITHER LIMITED NOR PRIVATE, BUT TO THE CONTRARY, WAS GENERAL.

- a. *Time element*. Certainly the period of time over which circulation occurred is an element. The time "Gaelic" was circulated was from 1923 to 1946. There is no dispute in this respect. From 1933 to 1946 it was circulated in bound mimeograph form.
- b. *Actual declarations by the author*. In three places in the record the author declares himself in respect to circulation of "Gaelic."

1. In 1933 Stewart Edward White sent out copies of "Gaelic" with a letter reading substantially as follows:

"I have finally made some extra copies of 'Gaelic' because so many of you wanted them, and herewith is your copy. I am glad to know of your interest, and I wish you to read it, to use it as you like, and pass it on to others, and for as long a time as you can. If you get through with it, you might return it to me, to hand to someone else. Otherwise, you are at liberty to keep it."

2. In 1940 he wrote to appellee using the following language:

"Just a hasty note, before you do any work copying Gaelic. Yesterday afternoon some people were here from Palo Alto who are so stuck on Gaelic that they want to copy it in mimeograph. They asked (a) whether I was willing; (b) if so, would I mind their pass—it around among such of their friends who want copies, (c) if so, again, whether I would mind their charging such people the exact cost. I approved. So, if you write them, you might get one of those copies. Name: Mrs. Frank Oettinger, RFD #1, Menlo Park, Cal." [Tr. pp. 30 and 31.]

3. In 1945 he wrote to Mrs. Oettinger as follows:

"As to the Gaelic, Sue Kimmell is quite right in saying that you may go ahead at your discretion with more copies of it. And your friend, Barbara Kelkin, got the wrong impression. I have no objection

whatever to the distribution of copies of Gaelic, provided, of course, it is not in published form.” [Tr. p. 31.]

Granted the circulation letter of 1933 went to friends of Stewart Edward White but his friends are requested to pass the manuscript around among their friends and at least, impliedly, his friends' friends are permitted to pass it on to their friends. There was no limitation in the letter. The letter of 1940 states that he has consented to an indefinite group of persons reproducing “Gaelic” and for the cost of production to sell it to such of their friends that want it. The letter of 1945 authorized Mrs. Oettinger to go ahead with further copies of “Gaelic” and the only reservation is that it not be in published *form*. The trial court treated this as an express reservation of publication rights. [Tr. p. 31.] It isn't, of course, it is only a restriction on the form of publication. But suppose, for purposes of argument, we assume he had instructed Mrs. Oettinger as follows: “You may make and distribute copies of ‘Gaelic’ at your discretion, charging cost of production for each copy, but I reserve all rights of publication.” We submit that under the law of copyright one may not eat his cake and have it too and the authorization to reproduce and sell at the discretion of the reproducer is a general publication where the authority is acted upon as it was here. The attempted reservation of rights of publication would be a nullity.

8. THERE IS NO AUTHORITY WHICH SANCTIONS THE EXTENT OF PUBLICATION SHOWN BY THE EVIDENCE HERE AS A PRIVATE OR RESTRICTED OR LIMITED PUBLICATION.

We know of no case which permits an author to go to the extremes that are shown by the evidence here and still claim a composition to be his literary property for purposes of copyright or any other purpose, either under the law of copyright or the common law rules governing rights in unpublished works. We find nothing in the authorities cited by the court which supports the decision and we challenge appellee to produce any authority whatsoever which goes to such extremes.

The decision should be reversed.

Respectfully submitted,

SCHAUER, RYON & McMAHON,  
ROBERT W. McINTYRE,  
THOMAS M. MULLEN,

*Attorneys for Appellant.*

